Supreme Court, U.S.
FILED

No. _____ 091508 JUN 8 - 2010

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In The

Supreme Court of the United States

DAVID CRITZER AND MARGARET CRITZER,

Petitioners,

v.

CITY OF CUPERTINO,

Respondent.

JERRY ENOS, ET AL.,

Real Parties in Interest.

On Petition For A Writ Of Certiorari To The Court Of Appeal, State Of California Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a homeowner demonstrate more than a non-trivial deprivation of property or privacy rights for the procedural due process protections of the 14th Amendment to apply?

2. Can a municipality avoid its constitutional obligation to provide homeowners with pre-deprivation notice and an opportunity to be heard by allocating *de facto* authority over such issues to a private organization?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiffs-Appellants and Petitioners: David Critzer and Margaret Critzer.

Defendant-Appellee and Respondent: City of Cupertino

Real Parties in Interest: Northpoint Homeowners Association, Jerry Enos and Darien Tung

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
WHY REVIEW SHOULD BE GRANTED	6
I. The Petition should be granted to resolve a conflict between multiple decisions of this Court and the California state courts concerning the minimum property deprivation required to implicate the Fourteenth Amendment's right to due process	6
II. The Petition should also be granted to make clear that a municipality may not evade responsibility for adhering to the Due Process Clause by delegating land use decisions to a private organization	12
CONCLUSION	13

APPENDIX

Opinion of the California Court of Appeal, Sixth Appellate District, dated December 21, 2009 ..... App. 1

TABLE OF CONTENTS – Continued

Page

Order Modifying Opinion and Denying Rehearing of the California Court of Appeal, Sixth Appellate District, dated January 14, 2010 ..... App. 32

Order After Hearing of the Superior Court, County of Santa Clara, dated January 29, 2008 ..... App. 34

Judgment on Petitions for Writ of Administrative Mandamus or Peremptory Writ of Mandate of the Superior Court, County of Santa Clara, dated February 4, 2008 ..... App. 36

Order Denying Review of the California Supreme Court, dated March 10, 2010 ..... App. 38

TABLE OF AUTHORITIES – Continued

Page

CASES

FEDERAL CASES

Board of Regents v. Roth, 408 U.S. 564 (1972) 7

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998) 8

Fuentes v. Shevin, 407 U.S. 67 (1972).....7, 8, 9

Goss v. Lopez, 419 U.S. 565 (1975).....7, 9, 11

Hardiman v. Jefferson County Board of Education, 709 F.2d 635 (11th Cir. 1983) 8

Kennedy v. City of Cincinnati, 595 F.3d 327, 2010 U.S. App. LEXIS 2960 (6th Cir. 2010).....7

Laney v. Farley, 501 F.3d 577 (6th Cir. 2007).....8

Lewis v. Woods, 848 F.2d 649 (5th Cir. 1988) 7

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).....11

Propert v. District of Columbia, 948 F.2d 1327 (D.C. Cir. 1991).....7

Rose v. Nashua Board of Education, 679 F.2d 279 (1st Cir. 1982).....7

Stephens v. City of Vista, 994 F.2d 650 (9th Cir. 1993) 12

Versarge v. Township of Clinton, 984 F.2d 1359 (3rd Cir. 1993) 8

West v. Atkins, 487 U.S. 42 (1988).....12

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Horn v. County of Ventura, 24 Cal.3d 605 (1979) 9, 10, 11

McCallop v. Carberry, 1 Cal.3d 903 (1970) 10

Randone v. Appellate Department of the Superior Court, 5 Cal.3d 536 (1971) 10

UNITED STATES CONSTITUTION

U.S. Constitution, Amendment 14 ..... *passim*

FEDERAL STATUTES

28 U.S.C. § 1257 2

28 U.S.C. § 2101(c) 2

MUNICIPAL CODES

Cupertino Municipal Code § 19.44.020(D) 2, 3

Cupertino Municipal Code § 19.44.060(F) 2, 3

OTHER REFERENCES

Supreme Court Rule 10 11

Supreme Court Rule 13.1 2

Supreme Court Rule 13.3 2

PETITION FOR A WRIT OF CERTIORARI

Petitioners David and Margaret Critzer respectfully petition for a writ of certiorari to review the opinion and judgment of the California Court of Appeal, Sixth Appellate District.

OPINIONS BELOW

The panel opinion of the California Court of Appeal, Sixth Appellate District, dated December 21, 2009, is unofficially reported at 2009 Cal. App. Unpub. LEXIS 10098, and is reproduced at App. 1-31.

The Order Modifying Opinion and Denying Rehearing of the California Court of Appeal, Sixth Appellate District, dated January 14, 2010, is unofficially reported at 2010 Cal. LEXIS 282, and is reproduced at App. 32-33.

The Order Denying Review of the California Supreme Court, dated March 10, 2010, is unofficially reported at 2010 Cal. LEXIS 2628, and is reproduced at App. 38.

The Order After Hearing of the Superior Court, County of Santa Clara, dated January 29, 2008, is reproduced at App. 34.

The Judgment on Petitions for Writ of Administrative Mandamus or Peremptory Writ of Mandate of the Superior Court, County of Santa Clara, dated February 4, 2008, is reproduced at App. 36.

JURISDICTION

The opinion and judgment of the California Court of Appeal, Sixth Appellate District sought to be reviewed was entered on December 21, 2009. The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the denial of a timely petition for review to the California Supreme Court. This Court has jurisdiction to review the judgment of the California Court of Appeal, Sixth Appellate District pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are: (1) the Due Process Clause of the Fourteenth Amendment to the U.S. constitution, which states in pertinent part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."; (2) Cupertino Municipal Code § 19.44.060(F), which states in pertinent part that "The following standards shall be utilized to evaluate the site and architectural design of a residential cluster development . . . . 2. The relationship between adjoining units shall be designed in such a manner so as to preclude visual intrusion into private outdoor yards or interior spaces."; and (3) Cupertino Municipal Code § 19.44.020(D), which states in pertinent part that "No building, structure or land shall be used, and no building or structure shall be hereafter erected, structurally

altered or enlarged in a residential cluster zone, otherwise than in conformance with the following provisions; except that uses, buildings and structures lawfully in existence at the time this chapter takes effect may remain as long as no alterations take place (except those alterations permitted by Santa Clara Ordinance NS-1200, Section 30, as it existed on October 10, 1955, which has been adopted by the City of Cupertino)."

STATEMENT OF THE CASE

In 1992, the City of Cupertino ("City") enacted a visual privacy ordinance which requires that adjoining units in townhome developments be arranged "in such a manner so as to preclude visual intrusion into private outdoor yards ***or interior spaces***." Cupertino Municipal Code § 19.44.060(F)(2) (emphasis added). This mandate applies to new construction as well as alterations to existing structures, including the residence at issue in this case. *See* Cupertino Municipal Code § 19.44.020(D).

In 2004, the immediately adjacent neighbor of Petitioners David and Margaret Critzer ("Petitioners") sought and obtained a building permit from the City to install a second-story bathroom window looking directly over Petitioners' backyard fence and

into their living room through a sliding glass door.[1] Prior to that point, Petitioners had lived in their home for fifteen years. Neither the neighbor, the City nor the local homeowners' association provided Petitioners with advance notice of the proposed addition, or an opportunity to object prior to issuance of the permit. The City granted the building permit based solely upon the homeowners' association's approval and without independent investigation, notwithstanding its duty to ensure the window installation's compliance with existing law. Petitioners first learned of the window addition only after it was almost completely installed.

Informally at first and then formally, Petitioners objected to the window installation as well as the City's failure to provide notice of the permit application. Despite the City Planner's determination that the window "create|d| privacy problems," those requests for redress were turned aside at every level of the municipal bureaucracy. After the Cupertino City Council rejected their protestations on a unanimous vote, Petitioners filed the instant mandamus proceeding against the City in Santa Clara County Superior Court.

In their Amended Petition for Writ of Mandamus, Administrative Mandamus, Alternative Writ, or

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[1] As originally designed thirty years earlier, and up to that point, the space where the window was installed had been a solid wall.

Peremptory Writ of Mandate, filed on January 2, 2007, Petitioners alleged that the City had violated their due process rights by, *inter alia*, failing to provide advance notice of the proposed window addition, and abdicating responsibility for ensuring compliance with its own ordinances to the homeowners' association. Amended Petition ¶ 29(a)-(b). After briefing and submission of written evidence, the trial court dismissed Petitioners' claims *in toto*, including those seeking mandamus relief based upon the City's due process violations. App. 34-35.

Petitioners then appealed to California's Sixth District Court of Appeal arguing, *inter alia*, that they were entitled to mandamus relief on the ground that the City violated their due process rights both by failing to provide notice prior to impinging upon their property and privacy interests, and by abdicating its ordinance compliance responsibilities to a private organization.

In a 21 page opinion, the Court of Appeal rejected Petitioners' due process claim in less than two pages, stating that the City's failure to provide notice did not result in a "severe . . . 'significant' or 'substantial' deprivation of property" sufficient to trigger Petitioners' rights under the Fourteenth Amendment. App. 28. Quoting from arguments presented to the Cupertino City Council, the appellate court reasoned that because the neighboring resident "could peer into the Critzers' property" at an angle from an outdoor balcony located at the other end of his unit, the incremental impact of the window addition on Petitioners' property

and privacy interests was not "so severe" as to implicate the Due Process Clause. App. 28.[2]

After their request for rehearing was turned down by the Court of Appeal, Petitioners sought review from the California Supreme Court, contending that this Court's precedents demonstrated beyond doubt that the impact of the window addition on Petitioners – even accepting *arguendo* the Court of Appeal's appellate fact-finding – easily met the *de minimis* threshold for invoking procedural due process protection. The California Supreme Court denied review of the lower court's decision on March 10, 2010. App. 38.

WHY REVIEW SHOULD BE GRANTED

I. The Petition should be granted to resolve a conflict between multiple decisions of this Court and the California state courts concerning the minimum property deprivation required to implicate the Fourteenth Amendment's right to due process

Thirty-five years ago, this Court held that judicial determinations as to whether due process

[2] Although the trial court made no findings on this point, the Court of Appeal cited this "evidence" in concluding that Petitioners "already had reduced privacy before the installation of the window" – while disregarding other portions of the Administrative Record which showed that the view from the neighbor's balcony was considerably less intrusive than that from the bathroom window. *See* App. 28-29, n. 6.

requirements apply to a particular deprivation of property rights "must not look to the 'weight' but to the *nature* of the interest at stake." *Goss v. Lopez*, 419 U.S. 565, 575-76 (1975) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (emphasis in original)). So long as "a property deprivation is not *de minimis*," *Goss* declared, "its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause." *Goss*, 419 U.S. at 576.

This Court has also provided unambiguous guidance regarding the proper inquiry to be utilized in deciding whether a given property interest is *de minimis*. The trial or reviewing court must resist the temptation to subjectively evaluate the property interests involved and then "protect only the ones that, by its own lights, are 'necessary.'" *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972).

These principles are now deeply embedded in the constitutional jurisprudence of the lower federal courts. Even the seizure of something as minor as a junk automobile or a prisoner's radio do not qualify as *de minimis* for due process purposes. *See Propert v. District of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991); *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988). Only where a deprivation of property is either illusory or trivial in character have the federal appellate courts dismissed a due process claim on *de minimis* grounds. *See, e.g., Rose v. Nashua Board of Education*, 679 F.2d 279, 282 (1st Cir. 1982) (Breyer, J.) (brief cancellation of school bus service); *Kennedy v. City of Cincinnati*, 595 F.3d 327, 2010 U.S. App.

LEXIS 2960 *16 (6th Cir. 2010) (loss of $10 recreational pool pass insufficient to raise due process claim).[3]

In other words, *de minimis* means just what it says in the due process context. Courts are no more entitled to disregard such rights based upon an *ad hoc* weighing of interests than municipalities or other government actors. *Fuentes* itself rejected an argument that the *ex parte* seizure of ordinary household goods did not implicate the Due Process Clause, stating:

> No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions.

Fuentes, 407 U.S. at 89-90 (noting that judges are ill-equipped to pick and choose among which property interests "provide a minimally decent environment for human beings in their day-to-day lives").

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[3] *Accord, Versarge v. Township of Clinton*, 984 F.2d 1359, 1370 (3rd Cir. 1993) (benefits loosely connected to volunteer position); *Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (one day, in-school suspension); *Dill v. City of Edmond*, 155 F.3d 1193, 1207 (10th Cir. 1998) (inconvenience due to revised work schedule); *Hardiman v. Jefferson County Board of Education*, 709 F.2d 635, 638 (11th Cir. 1983) (one week suspension of teacher with pay).

Against the backdrop of these well-established principles, the appellate court's decision in this case stands out like a mustache on the Mona Lisa. First, the appellate court paid no attention whatsoever to the *nature* of Petitioners' property deprivation, in direct contravention of *Goss*' command, and instead jumped straight into an analysis of its perceived weight. The lower court then compounded this error by holding Petitioners to a far more stringent test for property deprivation than *Goss*, *Fuentes* or any of the federal appellate cases cited above contemplate. Taking its cue from a California Supreme Court land use decision, the Court of Appeal asked not whether the deprivation at issue was *de minimis*, but whether it was "so severe" that it caused a "significant" or "substantial" impairment of Petitioners' property rights. App. 28-29 (quoting *Horn v. County of Ventura*, 24 Cal.3d 605, 616 (1979)).

By asking and answering the wrong question, the appellate court engaged in just the sort of subjective balancing which *Fuentes* prohibits, comparing the privacy implications of the window addition at issue to that of the preexisting balcony – ultimately concluding that the intrusiveness of the former did not represent a "significant" or "substantial" deprivation of Petitioners' property rights when compared to their previous level of privacy. App. 28-29. Imposing this heightened standard – as opposed to the genuinely *de minimis* test set forth in *Goss* and *Fuentes* – was, accordingly, improper even if one

accepts the lower court's appellate fact-finding as valid.[4]

The Court of Appeal's analysis is troubling not just because it flies in the face of numerous precedents from this Court and the lower federal courts. It appears to place real property on a lesser footing than other kinds of property when it comes to procedural due process protection. For decades now, this Court has recognized a wide variety of property interests whose deprivation implicates the Due Process Clause, including welfare benefits, government employment and public school attendance. The California Supreme Court has scrupulously respected, and to some extent anticipated, those precedents. *See, e.g., Randone v. Appellate Department of the Superior Court*, 5 Cal.3d 536, 542 (1971); *McCallop v. Carberry*, 1 Cal.3d 903, 907 (1970).

Here, by way of contrast, the appellate court seized upon language in *Horn* to create, in effect, a two-tier standard for invoking Fourteenth Amendment rights: a rigorous "significant" or "substantial" test for deprivations of real property-related rights, and an easily-met *de minimis* test for everything else. This Court has, however, squarely rejected the notion

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[4] Just looking at the incremental impact of having a neighbor's bathroom window looking into one's living room (and vice-versa), Petitioners submit that their *permanent* deprivation of property and privacy rights far exceeds the temporary or otherwise minimal deprivations which have been found not to meet the *de minimis* threshold.

of double standards under the Due Process Clause. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975) ("[w]e are no more inclined now than we have been in the past to distinguish among different kinds of property" when deciding whether more than a *de minimis* deprivation has occurred).

The Due Process Clause prevents states and their political subdivisions from "depriv[ing] any person of life, liberty, or property, without due process of law." The Fourteenth Amendment does not distinguish between different types of property, or single out real property for lesser protection than welfare benefits, chattels or public employment. Review by this Court is necessary, then, to reaffirm the procedural due process protections recognized in *Goss* and ensure the uniform application of the Due Process Clause to all types of property in state and federal courts nationwide.

The lower court's ruling decided an important question of federal constitutional law in a way that conflicts with multiple decisions of this Court, not to mention those of the lower federal courts. It is, moreover, predicated upon a decision of California's highest court – *Horn*, 24 Cal.3d at 616 – which encourages the courts of that state (as well as municipalities and administrative agencies) to look the other way when it comes to enforcing their citizens' property and privacy rights. This case, accordingly, satisfies the third criterion set forth in Supreme Court Rule 10 for granting plenary review.

II. The Petition should also be granted to make clear that a municipality may not evade responsibility for adhering to the Due Process Clause by delegating land use decisions to a private organization

By its own admission, the City granted the building permit at issue in this case based solely upon the homeowners' association's approval, while disclaiming any responsibility for ensuring that the association provided constitutionally adequate notice to Petitioners.[5]

It is axiomatic that governmental bodies may not delegate their core functions to private parties without retaining responsibility for the ultimate results. *See West v. Atkins*, 487 U.S. 42, 56 (1988) ("[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody"); *Stephens v. City of Vista*, 994 F.2d 650, 655 (9th Cir. 1993) (a "municipality may not contract away its legislative and governmental functions" in the land use context).

Here, the City abdicated its due process responsibilities by failing to provide constitutionally required notice to Petitioners, and then claimed that

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[5] City officials acknowledged this to be the case on numerous occasions. Administrative Record 006, 029, 142, 172, 344, 362. The only findings made by the City on this subject – summarized in the lower court's decision – were made *after* the window addition was completed and in response to Petitioners' objections.

any responsibility for providing such notice lay with the association. The Fourteenth Amendment does not, however, allow the City to pass the buck in this regard. Because the lower court's opinion flies in the face of basic constitutional precepts as enunciated by this Court, review should be granted to ensure that the Due Process Clause is applied uniformly by the state and federal courts. Absent such guidance, municipalities may – as here – feel free to delegate their due process obligations to homeowners' associations while turning a blind eye to the latter's lack of follow-through.

CONCLUSION

For all of the foregoing reasons, Petitioners ask this Court to grant their Petition for Certiorari.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DAVID CRITZER et al., Plaintiffs and Appellants, v. CITY OF CUPERTINO, Defendant and Respondent; JERRY ENOS et al., Real Parties in Interest and Respondents.	H032801 (Santa Clara County Super.Ct.No. CV066535) (Filed Dec. 21, 2009)

The underlying facts of this case involve a dispute between neighbors over a newly installed and allegedly intrusive bathroom window. The legal questions before us involve issues of municipal administrative procedure and constitutional due process requirements. Appellants present the following claims: the trial court wrongly denied them the remedy of administrative mandamus relief, erred by failing to rule that exhaustion of administrative remedies would be futile, and erred by striking and dismissing the Critzers' request for so-called "traditional" mandamus relief. They also present constitutional due process claims. We disagree in each case and will affirm the judgment of the trial court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. *Background Facts*

Jerry Enos, a real party in interest to this litigation, wanted to install a window in a bathroom in his residence, which is one unit of a planned community in the City of Cupertino (City). That community is the Northpoint planned unit residential development or common interest development governed by the Northpoint Homeowners Association (Association), which is also a real party in interest. Enos's neighbors, David and Margaret Critzer (the plaintiffs and appellants herein, and whom we refer to hereafter as the Critzers), also live in Northpoint, next door to the property Enos modified.

Enos sought and obtained the Association's permission to install the window. The Association took its action at a meeting that was regularly scheduled, but as far as we can tell on this record no agenda was widely circulated that would have advised the Critzers of Enos's application so that they could oppose it or seek a compromise before the work began. Moreover, neither Enos nor the Association advised the Critzers directly about Enos's intentions, as the Association's rules did not require individual notice to the Critzers.

With his plan approved, Enos was able to proceed under City ordinances requiring him to submit his plan and the Association's approval letter. The same ordinances give the Cupertino City Planner discretion

to issue a building permit if the city planner finds that the proposed changes are minor, do not affect the area's general appearance, and do not impinge on the interests of property owners inside or adjacent to the planned unit residential development, a category of property owners that includes the Critzers. City staff found that installing the window would satisfy all of the foregoing criteria and issued a building permit for the installation.

Because they were unaware of these various proceedings, the Critzers learned of the window-installation project only when a contractor began installing the aperture in Enos's bathroom.

II. *Administrative Proceedings*

On discovering that the window was being installed, the Critzers became concerned that it would invade their privacy because Enos could look from it into their living room.

After the window was installed, the Critzers contacted the City and expressed concerns about the privacy impacts of the window. The City interceded and helped the Critzers and the Association to mediate their dispute, and the city planner sent the Critzers a letter advising them that the City would take no further action regarding the issuance of the permit.

The mediation efforts failed and the Critzers sued Enos and the Association – a lawsuit not at

issue here. They also mounted an administrative challenge to the city planner's decision. The Critzers appealed the city planner's decision to the Cupertino City Manager. The city manager's designated hearing officer dismissed the appeal without prejudice to the Critzers to renew it after their lawsuit was resolved. The Critzers appealed that decision to the Cupertino City Council and requested, inter alia, that the city manager be required to proceed with the appeal hearing. The city council heard that matter on September 6, 2005, and referred it back to the city manager to conduct the appeal hearing. The city manager's designated hearing officer heard the appeal and ruled that City staff had acted properly in issuing the building permit. The Critzers appealed that decision to the city council, which heard that appeal at a regular session and denied it.

The Cupertino City Council hearing, dated April 4, 2006, is a valuable portion of the record before us because it distilled, clarified, and placed in context the circumstances of this case. Those present included the city manager's representative who heard the appeal and denied it at the administrative level, Margaret Critzer, and counsel for the Critzers and the City. Their perspectives, as well as that of the Cupertino Mayor and council members, were thoroughly aired.

The city manager's representative told the mayor and council members that the Critzers' appeal was denied because the City had complied with a code provision that provides that any minor modification

in a cluster zone development requires the approval of the permit request by the Association. The Association gave that approval in writing to the City in February of 2004; it was on this basis that the City issued the permit. Thereafter (as we have noted) the City tried to resolve the neighbors' private dispute through mediation.

It was then the Critzers' counsel's turn to speak. He explained that Enos had refused to participate in the mediation and had rejected the proposed solution that had emerged. Counsel stated, "You could remove the window. You could also seal the window and have opaque screening or glass installed, so that the view is blocked. You could require the fence . . . to be raised; and in so doing, the view would be blocked."

A council member said, "but if you . . . compare this window, and – I mean, this photo with our staff photo, this half cannot even be seen. Only this side is . . . openable, and [you] have the mini blinds or something covering. [¶] So you were talking about [how] this guy can see you, [but it] is really . . . only this half of the window can look . . . out."

Margaret Critzer responded that "that's large enough for . . . a camera. We've had our – we've had our comings and goings monitored. . . . [O]ur comings and goings were monitored. So it's large enough to monitor our comings and goings."

As noted, after hearing these comments and participating in the discussion, the mayor and council members voted to deny the appeal. Notice of that

decision was mailed to the Critzers. The notice included a statement that anyone desiring judicial review of the decision must first file a reconsideration petition with the City. In boldface italics, the statement advised: "Any interested person, including the applicant, prior to seeking judicial review of the city council's decision in this matter, must first file a petition for reconsideration with the city clerk within ten days after the council's decision. Any petition so filed must comply with municipal ordinance code § 2.08.096." (That code section sets forth permissible grounds on which to seek reconsideration; we will quote it below.) The Critzers did not file a reconsideration petition.

III. *Judicial Proceedings*

On June 30, 2006, the Critzers filed a writ petition in superior court. Because they later amended it, we will not describe it in detail here, except to note that it sought a writ of administrative mandamus, alternative writ, or peremptory writ of mandate, named the City as respondent and Enos, the Association, and Darien Tung as real parties in interest (allegedly Enos had sold his residence by then and Tung had bought it), and alleged that the Critzers had exhausted their administrative remedies by appealing the city manager's decision to the city council.

The City filed a demurrer, claiming that in fact the Critzers had not exhausted the administrative remedies available to them.

The trial court sustained the demurrer with leave to amend on grounds that the Critzers "have not alleged the exhaustion of their administrative remedies." The court also granted a request by the City to take judicial notice of chapter 2.08, section 2.08.096 of the Cupertino Municipal Code, which requires exhaustion of administrative remedies before judicial review may be sought.

On January 2, 2007, the Critzers filed an amended petition for writ of mandamus (Code Civ. Proc., § 1085),[1] writ of administrative mandamus (§ 1094.5), alternative writ (§ 1087), or peremptory writ of mandate (§ 1088), naming the same respondent and real parties in interest as had the original petition.

The amended petition sought to have the trial court direct the City to invalidate the building permit for the window, declare the window to be a public nuisance because it infringed on City-created interests in the Critzers' privacy rights, and order the window "removed or replaced." The amended petition alleged in substance that the City had improperly ceded to the Association the City's authority under

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[1] Further references are to the Code of Civil Procedure unless otherwise indicated.

the Cupertino Municipal Code to protect the Critzers' privacy rights.

The City filed a demurrer to the amended petition on the grounds that it failed to state a cause of action and was uncertain. On March 28, 2007, the trial court filed an order overruling the City's general demurrer because it addressed only part of a cause of action, and overruling the demurrer to the extent it was based on uncertainty. In so doing, however, the court ordered stricken, on its own initiative, the prayer for the issuance of a writ of mandamus under section 1085, and did so without leave to amend. In a written ruling it explained that "[the City's] duty to issue (or deny) the permit was not strictly ministerial. [Cupertino] Municipal Code [chapter 19.44,] section 19.44.080, subdivisions A-B gave [the City] discretion to make the factual finding that triggered its duty to issue (or deny) the permit. Thus, [the City] did not have a ministerial duty to deny the permit, and traditional mandamus is not available. A motion to strike, not a general demurrer, is the procedure to attack an improper claim for a remedy demanded in the complaint. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561.) Code of Civil Procedure section 436 authorizes the [c]ourt, at any time in its discretion, to strike any part of a pleading not drawn in conformity with the laws of this state. Accordingly, Petitioners' prayer for the issuance of a writ of traditional mandamus under Code of Civil Procedure section 1085 is stricken, without leave to amend."

On April 11, 2007, the City filed its answer to the remaining portion of the amended petition.

On May 7, 2007, the Critzers filed a motion to correct the administrative record. On July 30, 2007, the trial court filed an order denying the motion. The order explained that the records the Critzers sought to add to the administrative record had not been reviewed by the city council when it made its decision.

On December 20, 2007, the Critzers filed a motion seeking leave to file a second amended petition. On January 24, 2008, the trial court filed an order denying that motion too, but without prejudice to raise legal arguments described in the Critzers' motion based on evidence contained in the administrative record.

The case was tried to the court on January 28, 2008, and it filed an order the next day ruling that the Critzers could not proceed under section 1094.5 because they had failed to exhaust their administrative remedies and had failed to allege or prove a futility exception to that requirement; that traditional mandamus pursuant to section 1085 was not available; and that the Critzers had failed to show an abuse of discretion by the City. The order directed that the petition be dismissed for those reasons. On February 4, 2008, the court filed judgment accordingly.

DISCUSSION

The Critzers argue that the trial court (1) misconstrued Cupertino Municipal Code chapter 2.08, section 2.08.096 by inaccurately interpreting its exhaustion-of-administrative-remedies requirement, and therefore they are entitled to pursue administrative mandamus relief under section 1094.5; (2) erred by failing to rule that exhaustion of administrative remedies would be futile; and (3) erred by striking and dismissing the Critzers' request for mandamus relief under section 1085. They also argue that the City committed constitutional due process violations or must be held to account for others' commission of them.

None of the Critzers' claims has sufficient merit to permit this court to overturn the order and judgment of the trial court.[2]

[2] In response to the Critzers' appeal, the City filed two applications that we will deny as moot. The first application consists of a supplemental request for this court to take judicial notice of two documents labeled Exhibits C and D. Exhibit C is a document bearing a Santa Clara County Superior Court file stamp dated December 5, 2008, and titled "Order After Hearing on Motion to Enforce Settlement" pursuant to section 664.6. The order pertains to a related case, Critzer v. Enos et al. (Santa Clara County Super.Ct.No. 1-05-CV-034156). Exhibit D is a separate order, showing a Santa Clara County Superior Court file stamp dated January 30, 2009, and also bearing on the related case. The second application is the City's objection to the Critzers' reference to an item that the City contends is not part of the record on appeal, specifically an image, assertedly derived from a videotape that the Critzers appended to their reply brief.

(Continued on following page)

Prefatorily, we must explain the differences between administrative mandamus under section 1094.5 and so-called ordinary or traditional mandamus relief under section 1085. "In the context of appeals from public agency decisions, an adjudicatory or quasi-judicial decision affects the rights of a specific individual or entity and it is reviewed by administrative mandate under . . . section 1094.5. The decision must have resulted from a proceeding in which a hearing is required, evidence is taken, and discretion in the determination of facts is given to the agency. [Citation.] A nonadjudicatory or quasi-legislative decision, by contrast, adopts a rule, regulation, or policy decision of general application and is reviewed by ordinary mandate under . . . section 1085. [Citation.]" (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1056-1057, fn. 9.) Other differences, particularly regarding the ministerial nature of proceedings that may lead to a remedy under section 1085, will be described below.

I. *Administrative Mandamus – Exhaustion of Administrative Remedies*

We turn first to the Critzers' claim that the trial court (1) misconstrued Cupertino Municipal Code chapter 2.08, section 2.08.096 by inaccurately

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Given our disposition of this case, it is unnecessary to consider these applications further.

interpreting its exhaustion-of-administrative-remedies requirement, and therefore they are entitled to pursue administrative mandamus relief under section 1094.5.

Writ review under section 1094.5 entails an examination of the administrative record (see *id.*, subd. (a)), and the agency's findings of fact must be upheld if supported by "substantial evidence in the light of the whole record." (*Id.*, subd. (c).) But that presupposes that writ review is available in the first place. "A petition for a writ of administrative mandate under Code of Civil Procedure section 1094.5 may be brought only 'for the purpose of inquiring into the validity of any *final* administrative order or decision. . . .'" (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 974, quoting § 1094.5, subd. (a), italics added.) Accordingly, before the Critzers could proceed under the administrative mandamus statute, section 1094.5, they were required to exhaust all available administrative remedies. (*Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 415.)

As long as an agency has "jurisdiction to make a judicial determination of the type involved" (*Alpine County v. Tuolumne County* (1958) 49 Cal.2d 787, 798) and there is a "need to exhaust administrative remedies provided for a statutory right" (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 84), "the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative

body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.)

"'[E]xhaustion of administrative remedies furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy.'" (*Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 644; see *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1094 (dis. opn. of Baxter, J.).)

Whether the Critzers exhausted their administrative remedies is a question that we decide on independent, i.e., de novo, review: "We apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case." (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873; accord, *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) Applying that standard of review, we conclude that the Critzers did not fulfill the exhaustion-of-administrative-remedies requirement.

Cupertino Municipal Code chapter 2.08, section 2.08.096 provides in relevant part:

"A. The City Clerk shall forthwith mail all notices of decision after the decision of the City Council. Any interested person, prior to seeking

judicial review of any adjudicatory decision of the City Council, shall file a petition for reconsideration with the City Clerk within ten days of the date of the mailing of the notice of decision. Failure to file a petition for reconsideration constitutes a waiver of the right to request reconsideration and the City Council's decision shall be final for all purposes. Upon timely receipt of a petition for reconsideration, the City Clerk shall schedule a reconsideration hearing to be commenced by the City Council no later than sixty days after the filing of the petition. Mailed notices of the date, time, and place of such hearing will be provided to all interested persons at least ten days prior to the hearing. At the conclusion of the hearing for reconsideration, the City Council may affirm, reverse, or modify its original decision, and may adopt additional findings of fact based upon the evidence submitted in any and all city hearings concerning the matter.

"B. A petition for reconsideration shall specify, in detail, each and every ground for reconsideration. Failure of a petition to specify any particular ground or grounds for reconsideration[ ] precludes that particular omitted ground or grounds from being raised or litigated in a subsequent judicial proceeding.

"The grounds for reconsideration are limited to the following:

"1. An offer of new relevant evidence which, in the exercise of reasonable diligence, could not have been produced at any earlier city hearing.

"2. An offer of relevant evidence which was improperly excluded at any prior city hearing.

"3. Proof of facts which demonstrate that the City Council proceeded without, or in excess of its, jurisdiction. [*Sic.*]

"4. Proof of facts which demonstrate that the City Council failed to provide a fair hearing.

"5. Proof of facts which demonstrate that the City Council abused its discretion by:

"a. Not preceding [*sic*] in a manner required by law; and/or

"b. Rendering a decision which was not supported by findings of fact; and/or

"c. Rendering a decision in which the findings of fact were not supported by the evidence."

A. *Nature of Requirement to Exhaust Administrative Remedies*

The Critzers contend that Cupertino Municipal Code chapter 2.08, section 2.08.096, subdivision (A), did not require them, by its plain language, to seek reconsideration of the City Council's decision and that therefore they exhausted their administrative remedies, contrary to the trial court's finding. They argue that, "read in the context of an otherwise purely procedural paragraph, it appears merely to establish a timetable for . . . parties who *opt* to request reconsideration of a City Council decision." The

provision "requires simply that any request for reconsideration must be filed within ten days of the City Council's decision, and before seeking judicial review. In other words, [it] lays out the parameters for whatever reconsideration request a party wishes to file, rather than making such a request mandatory in every case."

We do not agree with the Critzers' interpretation. The language of Cupertino Municipal Code chapter 2.08, section 2.08.096 required the Critzers to seek city council reconsideration of the council's decision before they could proceed to court. Subdivision (A) provides in part: "Any interested person, prior to seeking judicial review of any adjudicatory decision of the City Council, shall file a petition for reconsideration with the City Clerk within ten days of the date of the mailing of the notice of decision." Subdivision (B) provides in part: "Failure of a petition to specify any particular ground or grounds for reconsideration[ ] precludes that particular omitted ground or grounds from being raised or litigated in a subsequent judicial proceeding."

The Critzers call our attention to Cupertino Municipal Code chapter 1.16, section 1.16.020, "Procedure for Appeal," subdivision (D), which provides: "Appeals to the City Council. . . . The Council may by resolution affirm, reverse or modify in whole or in part the determinations of the City Manager. The

findings of the Council shall be final and conclusive."[3] The general rules of statutory construction apply, however, to city ordinances (*City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1490), and under those rules a more specific provision regarding a particular subject prevails over a more general provision regarding that same subject (*People v. Johnson* (1995) 33 Cal.App.4th 623, 631). The general rule about finality of city council actions stated in section 1.16.020 is, therefore, controlled by the more specific rule regarding reconsideration set forth in Cupertino Municipal Code chapter 2.08, section 2.08.096.

The Critzers also argue that the ordinance's listed reconsideration grounds do not encompass their contention before the city council, which they assert involved the construction of "legal and constitutional provisions." We do not agree. Cupertino Municipal

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[3] In its entirety, Cupertino Municipal Code chapter 1.16, section 1.16.020, subdivision (D) provides: "Appeals to the City Council. Unless otherwise provided for by specific ordinances any person dissatisfied with the action or judgment of the City Manager may appeal to the City Council by filing a written request which states the specific reason for the appeal within ten business days of the serving or mailing of the determination. The City Clerk shall schedule a hearing before the City Council within 30 days after receipt of the request for appeal. The party requesting the hearing will receive written notice of the date, time, and place of the hearing. The Council may by resolution affirm, reverse or modify in whole or in part the determinations of the City Manager. The findings of the Council shall be final and conclusive. Any amount found to be due shall be immediately due and payable upon Council action."

Code chapter 2.08, section 2.08.096 sets forth a wide range of grounds on which to seek reconsideration, among them that the City Council did not proceed "in a manner required by law." To be sure, it can be argued that this provision applies only to procedural defects, such as a failure to observe the open-meeting requirements of the Ralph M. Brown Act (see *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 732 & fn. 1). But the wording of the provision colorably is broad enough to encompass substantive defects as well and the Critzers should have taken advantage of that circumstance. Moreover, the Critzers' claim was not purely legal but presented a mixed question of law and fact.

B. *Futility Exception to Exhaustion Requirement*

Relying on the well-established rule that a party need not exhaust administrative remedies when doing so would be futile and idle (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936; see Civ. Code, § 3532), the Critzers argue that the City council members' rejection of their appeal, by unanimous vote, would have made it legally futile to seek reconsideration.

Although each party is able to cite authority that supports its position in principle, ultimately we do not agree with the Critzers. To be sure, "[f]ailure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile." (*Jonathan Neil*

& Assoc., Inc. v. Jones, supra, 33 Cal.4th at p. 936.) Nevertheless, the futility doctrine is narrow in scope and our Supreme Court has been reluctant to apply it, and indeed somewhat dismissive of it (see *ibid.*), unless it is absolutely clear that exhausting administrative remedies would be of no use whatever. (See *ibid.*; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418; *Gantner & Mattern Co. v. California E. Com.* (1941) 17 Cal.2d 314, 318 (*per curiam*).) The law generally follows this rule. (See *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 691 [collecting cases that illustrate the unusual circumstances required for the futility doctrine to apply].) No impossibility of a different result existed here if the Critzers had sought reconsideration. No council member stated, in effect, "Don't bother coming back; we won't listen." The council members had taken time to consider the merits of the Critzers' position and members of the council expressed sympathy for them. It is also significant that, as previously noted, the City's letter advising the Critzers of the City Council's negative decision informed them, in boldface italics, that the Critzers "must first file a petition for reconsideration with the City clerk" before "seeking judicial review of the city council's decision in this matter." Because the exhaustion requirement was so plain, the Critzers' failure to take all necessary steps – even if those steps would be unlikely to lead to a different result – militates against granting relief under the futility exception. The Critzers had "notice of the administrative proceedings and actively participated at every

stage of the hearing process. . . . [They] *were explicitly reminded of the available administrative appeal.* Under these circumstances, [their] failure to exhaust their administrative remedies cannot be excused. . . ." (*Sea & Sage Audubon Society, supra,* at p. 418, italics added.) The standard that the Critzers propose would, in essence, amount to a rule that when an elected governmental body unanimously votes to deny an appeal from a staff decision, further proceedings before the elected body must be deemed futile. For the reasons set forth above, we cannot agree.

The Critzers, as noted, cite authority that in principle supports their position. They rely notably on *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830. In *Ogo,* however, the city had acted affirmatively and preemptively to block the very thing on which the plaintiffs' request would have rested. "The evidence is overwhelming that the city council rezoned the . . . area because appellants planned to build their project there; it is inconceivable the city council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. This is not a situation where the possibility of relief from a general policy exists because of the unusual circumstances of a particular case; to the contrary, in this instance the circumstances of the particular case gave birth to the ordinance's general policy." (*Id.* at p. 834.) In this case, unlike *Ogo,* "[w]e do not have a situation where the agency" "issued rulings which would preclude the claim's allowance. . . ." (*Economic Empowerment*

Foundation v. Quackenbush, supra, 57 Cal.App.4th at p. 691, citing *Ogo* as involving that situation.)

II. *Availability of Mandamus Relief Under Section 1085*

The Critzers contend that the trial court erred in ruling that they could not seek relief via petition for writ of mandamus under section 1085 because the City Council "did not have a ministerial duty to deny the permit, and [therefore] traditional mandamus is not available."

"'In reviewing the trial court's ruling on a writ of mandate [under Code of Civil Procedure section 1085], the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible and competent evidence. This limitation, however, does not apply to resolution of questions of law where the facts are undisputed. In such cases, as in other instances involving matters of law, the appellate court is not bound by the trial court's decision, but may make its own determination. [Citation.]'" (*Pacific Gas and Electric Co. v. State Department of Water Resources* (2003) 112 Cal.App.4th 477, 491.)

Subdivision (a) of section 1085 provides: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and

enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person."

This provision, which, as noted, is sometimes referred to as authorizing ordinary or traditional mandamus relief, operates to authorize relief when one of the foregoing entities is refusing to do some act and has no say in the matter. It is, however, not available to provide relief to a party against the discretionary acts of governmental entities. The rule has been summarized in these terms: "Generally, mandamus may be used only to compel the performance of a duty that is purely ministerial in character. [Citation.] The remedy may not be invoked to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular way. [Citation.] [¶] 'A ministerial act has been described as "an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given set of facts exists." [Citation.] On the other hand, discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citations.]' " *(Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1002-1003; see *State of California v. Superior Court* (1974) 12 Cal.3d 237, 247.) In summary, section 1085 "cannot be used to compel the exercise of

discretion in a particular manner or to order a specific result when the underlying decision is purely discretionary." (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 138; see *id.* at p. 137 [petitioner was proceeding under section 1085].) "To warrant . . . relief, the petitioner must demonstrate [that] the public official or entity had a ministerial duty to perform" (*id.* at p. 138), i.e., a duty that must be performed in a prescribed manner and whose performance does not involve the exercise of evaluation or judgment (see *ibid.*).

The Critzers argue that the City improperly shifted responsibility for enforcing city ordinance provisions to the Association. Although the mayor and city council members deliberated at length following the contested hearing in the council chambers, the Critzers maintain that the city council had no choice but to approve their appeal because city ordinances compelled that action. They note the existence of the following provisions of the Cupertino Municipal Code: "The relationship between adjoining units shall be designed in such a manner so as to preclude visual intrusion into private outdoor yards or interior spaces." (Cupertino Municipal Code, ch. 19.44, § 19.44.060, subd. (F)(2).) " 'Visual privacy intrusion' means uninterrupted visual access from a residential dwelling or structure into the interior or exterior areas of adjacent residential structures, which area is either completely or partially private, designed for the sole use of the occupant, and/or which serves to fulfill the interior and/or exterior privacy needs of the

impacted residence or residences." (*Id.*, ch. 19.08, § 19.08.030.) Finally, "no facility, structure or building shall be erected, constructed, enlarged, altered, moved or used in any district, as shown upon the zoning maps, except in accord with the regulations . . . " (*id*, ch. 19.04, § 19.04.030; see also § 19.44.020, subd. (D)) and any building so altered constitutes a public nuisance (§ 19.04.050). In sum, the Critzers argue that the City's duty was not discretionary but ministerial, so that they were entitled to proceed under section 1085 to have the City ordinances enforced in their favor. Alternatively, they assert that the City's duty contained ministerial aspects even if it was not wholly ministerial.

In turn, the City argues that its decision to approve the permit was entirely discretionary. It cites Cupertino Municipal Code chapter 19.44, section 19.44.080, which provides in pertinent part:

"A. In the event that the applicant [for the original development of the residential single-family cluster zone] shall desire to make any change, alteration or amendment in the approved Development Plan or covenants after a cluster zone has been granted by the City Council, a written request and revised development plan shall be submitted to the Building Department. Along with the plans, a letter of approval from the appropriate homeowners association or architectural board shall be submitted.

"B. If the number of dwelling units is not increased, and the City Planner makes a finding that

the changes are minor and do not affect the general appearance of the area or the interests of owners of property within or adjoining the development area, the building permit will be issued. If the homeowners association fails to act, the Planning Director may make a determination of significance. The Planning Director may issue a building permit or require that the applicant receive architectural and site approval. If the homeowners association issues a statement opposing the proposed modifications, the property owner must submit for architectural and site approval. Building permits will not be issued until City Council approves the request. . . ."[4]

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[4] Cupertino Municipal Code chapter 19.44 applies to residential single-family cluster zones. The parties agree that the Critzers live in such a zone. The zone's characteristics are set forth in section 19.44.030:

"Characteristics of RIC Zones.

"A. A residential single-family cluster zone is a land use designation for a single family residential use upon a parcel of real property, a portion of which consists of:

"1. An undivided interest in a common area used for open space, recreational, parking, vehicular and pedestrian circulation by residences of the parcel;

"2. Separate property interests owned by each family residing on the parcel.

"B. The separate property interests may include:

"1. Individual subparcels which comprise building areas only or building areas plus private yards or atria; or

"2. Separate property interests in space in a residential building on the parcel; or

"3. Both types of separate property interests enumerated above."

Because the issue turns on the interpretation of the Cupertino Municipal Code, we will review the trial court's ruling without deference. (*Pacific Gas and Electric Co. v. State Department. of Water Resources, supra,* 112 Cal.App.4th at p. 491.) Nevertheless, it is evident that the ruling was correct. The City argues that Cupertino Municipal Code chapter 19.44, section 19.44.080 required the City to exercise discretion to determine that installing the bathroom window in the Enos residence was a minor change, a change that did not affect the area's general appearance, and a change that did not affect neighboring property owners' reasonable expectations, i.e., substantial interests.[5] That is so. Additional documentation of the discretionary nature of the proceedings that led to the denial of the Critzers' appeal to the City Council may be found in section 19.44.020, which provides: "B. The requirements of this chapter can be waived or modified if the Planning Commission and City Council make any one of the following findings: [¶] 1. Although one or more specific standards cannot be complied with because of property size constraints, existing building morphology, topographical problems, or other conditions beyond the control of the property owner/developer,

[5] Because "interests," as used in the third criterion of Cupertino Municipal Code chapter 19.44, section 19.44.080, subdivision (B), is a broad and amorphous term, we interpret that term to mean interests substantial enough to upset neighboring property owners' reasonable expectations regarding the quiet enjoyment of their property.

the proposed project substantially complies with the general standards contained within this chapter. . . ."

In sum, and as explained above, because the City's decision-making process involved the exercise of discretion, section 1085 relief was not available to the Critzers, and the trial court correctly so ruled.

III. *Due Process*

A. *Adequacy of Notice of Request to Install Window*

The Critzers claim that the City violated their due process rights by failing to provide them with adequate notice, either itself or through the Association, that the Association would be considering Enos's request to install the bathroom window.

"[L]and use decisions which 'substantially affect' the property rights of owners of adjacent parcels may constitute 'deprivations' of property within the context of procedural due process." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 615.) "We emphasize, however, that constitutional notice and hearing requirements are triggered only by governmental action which results in 'significant' or 'substantial' deprivations of property, not by agency decisions having only a de minimis effect on land." (*Id.* at p. 616; see *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 626.)

As noted, the Association took up the request at a meeting that was regularly scheduled, but the record

suggests that no agenda was widely circulated that would have advised the Critzers of the request.

Assuming that to be the case, we acknowledge that the Association failed to provide adequate notice to the Critzers that Enos wished to install a window that might have an impact on their privacy. Nevertheless, to the extent that the Association's apparently uninformative notice procedure inures against the City or constitutes a defalcation by an entity that has quasigovernmental powers and thus has constitutional implications (see *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 651), we cannot find inadequate notice with results so severe – i.e., inadequate notice resulting in a "'significant' or 'substantial' deprivation[ ] of property" (*Horn v. County of Ventura, supra,* 24 Cal.3d at p. 616) – as to implicate the due process clause of the Fourteenth Amendment to the United States Constitution or the due process clauses in article I, sections 7 and 15 of the California Constitution. The record contains evidence that because of the close quarters in the cluster-zone development the Critzers already had reduced privacy before the installation of the window as afterward. Enos and any successor in interest could peer into the Critzers' property from the balcony.[6] Installing the window afforded another

[6] The city manager's representative told the mayor and council members that "the way these condominiums were constructed, there's a balcony at the end of this condo; it was a part of the original construction. The window, if someone were

(Continued on following page)

opportunity for such activity, if the adjoining property owner wished to engage in it. But because the neighbor could do so already, even if perhaps with more effort than it would take to look out the window, there was no significant or substantial deprivation of the Critzers' property rights.

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looking out this window, this room from which the balcony protrudes, it's the same level, as the – as the bathroom; and so someone looking out this window would have the same view as someone standing on this balcony, looking the same direction. So it really is – is very similar. You can see the balcony behind the trees here. And someone who would be standing there would be standing at the same level as someone at the bathroom."

A council member asked Margaret Critzer and her counsel about the City's contention that the neighbor's existing balcony afforded the same view into their residence.

Counsel replied that the neighbor would "have to make a concerted effort to come stand at a particular point on the balcony and . . . look out. It's not a view that one standing in the house, in the neighbor's house, could look in. So they have to come out onto the balcony and intentionally turn, look sideways on their balcony, into the Critzers' . . . property, in order to do that. Whereas in the bathroom, they're right there. . . ."

The council member replied, "but if you . . . compare this window, and-I mean, this photo with our staff photo, this half cannot even be seen. Only this side is . . . openable, and [you] have the mini blinds or something covering. [¶] So you were talking about [how] this guy can see you," but it "is really . . . only this half of the window can look . . . out."

B. *Consideration of the Critzers' Appeal Solely by the City Manager*

The Critzers contend that they sought review both before the City's Planning Commission and the city manager but, in violation of their due process rights, only the city manager acted.

The Critzers have failed to preserve this claim for review. They assert that they paid a filing fee to the City for the Planning Commission appeal. If they did, however, they do not point to anything in the record that would show that they pursued their case further with the Planning Commission. Instead, the record shows that they vigorously presented their contentions to the city manager and the city council. They did not complain to the city council that the Planning Commission should act before the city council made its decision. They may not object now.

DISPOSITION

The judgment is affirmed. Respondent's motion for supplemental request for judicial notice and its objection to reference to materials outside of the designated record are denied as moot.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.

Critzer et al. v. City of Cupertino
No. H032801

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DAVID CRITZER et al., Plaintiffs and Appellants, v. CITY OF CUPERTINO, Defendant and Respondent; JERRY ENOS et al., Real Parties in Interest and Respondents.	H032801 (Santa Clara County Super.Ct.No. CV066535) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN THE JUDGMENT (Filed Jan. 14, 2010)

THE COURT:

It is ordered that the opinion filed herein on December 21, 2009, be modified as follows:

On page 17 in the second full paragraph in the first sentence that begins with a quotation mark, remove the bracketed comment so the sentence reads as follows:

> "A. In the event that the applicant shall desire to make any change, alteration or amendment in the approved Development Plan or covenants after a cluster zone has been granted by the City Council, a written

request and revised development plan shall be submitted to the Building Department."

There is no change in the judgment.
The petition for rehearing is denied.

Dated: JAN 14 2010

Duffy, J.

Bamattre-Manoukian, Acting P.J.

McAdams, J.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DAVID CRITZER and MARGARET CRITZER, Petitioners, vs. CITY OF CUPERTINO, Respondent.	Case No.: I-06-CV-066535 ORDER AFTER HEARING (Filed Jan. 29, 2008)

Petitioners' Amended Petition for Writ of Mandamus, Administrative Mandamus, Alternative Writ, or Peremptory Writ of Mandate of January 2, 2007 (the "Petition") came on for hearing on January 28, 2008 in Department 1, the Honorable James P. Kleinberg presiding. Alexander K. Abraham, Esq. and Brandon L. Reeves, Esq. appeared for Petitioners. Charles T. Kilian, Esq. and Eileen H. Murray, Esq. appeared for Respondent.

The Court, having reviewed the file, the administrative record, the moving and opposing papers of the parties, having heard and considered the argument of counsel, and being fully advised, rules as follows:

1. Respondent's Request for Judicial Notice of January 14, 2008 is GRANTED without opposition.

2. The Court finds:

a. Petitioners failed to exhaust their administrative remedies;

b. Petitioners failed to allege or prove that a futility exception was applicable;

c. Pursuant to the Court's Order of March 28, 2007 traditional mandamus pursuant to Code of Civil Procedure § 1085 is unavailable to Petitioners;

d. Petitioners failed to demonstrate that the Cupertino City Council abused its discretion.

3. For all of the foregoing reasons, the Petition is DISMISSED.

IT IS SO ORDERED

Dated: January 29, 2008

/s/ James P. Kleinberg
Honorable James P. Kleinberg
Judge of the Superior Court

Charles T. Kilian (State Bar No. 49559)
Eileen H. Murray (State Bar No. 182288)
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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
CIVIL DIVISION

DAVID CRITZER AND MARGARET CRITZER, Petitioners, vs. CITY OF CUPERTINO, a California municipal corporation; Respondent. JERRY ENOS, DARIEN TUNG, AND NORTHPOINT HOMEOWNERS ASSOCIATION, Real Parties in Interest	Case No.: 106CV066535 JUDGMENT ON PETITIONS FOR WRIT OF ADMINISTRATIVE MANDAMUS OR PEREMPTORY WRIT OF MANDATE (Code of Civil Procedure § 1094.5; 1085) (Filed Feb. 4, 2008)

This cause came on regularly for trial on January 28, 2008 at 9:30 a.m. in Department 1, the Honorable James P. Kleinberg presiding, sitting without a jury. Petitioners appeared by their attorneys, Alexander K.

Abraham, Esq. and Brandon L. Reeves, Esq., and Respondent appeared by its attorneys, Charles T. Kilian, Esq. and Eileen H. Murray, Esq.

The Court, having reviewed the file, the administrative record, the moving and opposing papers of the parties, have heard and considered argument of counsel, and being fully advised, and having made and filed herein its written Order After Hearing dismissing Petitioners' petition.

It is ORDERED, ADJUDGED AND DECREED as Follows::

1. The Petition seeking Administrative Writ of Mandamus and Peremptory Writ of Mandate is DENIED.

2. Respondent and Real Parties in Interest shall recover their costs.

Dated: 2/1/08

/s/ James P. Kleinberg
Honorable James P. Kleinberg
Judge of the Superior Court

Court of Appeal, Sixth Appellate District –
No. H032801

S179891

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DAVID CRITZER, et al., Petitioner and Appellant,

v.

CITY OF CUPERTINO, Defendant and Respondent;

JERRY ENOS et al., Real Parties in Interest.

(Filed Mar. 10, 2010)

The petition for review is denied.

The request for an order directing publication of the opinion is denied.

/s/ GEORGE
Chief Justice